82-1024

No.

IN THE

Supreme Court of the United States

October Term, 1982

THE BOEING COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS (NOW MERGED INTO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT)

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QUESTIONS PRESENTED

1. Whether the Cost Accounting Standards Board ("CASB") was appointed in a manner contrary to the Appointments Clause, Article II, section 2, clause 2 of the Constitution?

2. Whether the Court of Claims disregarded controlling decisions of this Court in refusing to reach the merits of the constitutional question on the grounds that (a) the *de facto* officer doctrine precluded any recovery by Boeing, and that (b) the Cost Accounting Standard in question had been independently adopted by the Department of Defense?

3. Whether, in interpreting CAS 403, the Court of Claims disregarded controlling decisions of this Court with respect to the judicial deference due an agency's interpretation of its own regulations?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case includes all parties. Pursuant to Rule 28.1 of the Supreme Court of the United States Revised Rules, effective November 21, 1980, The Boeing Company has no corporate parent; its subsidiaries, other than wholly owned subsidiaries and affiliates are: Peabody Holding Co., Inc.; Mid-Continent Barge Lines, Inc.; Minority Enterprise Small Business Investment Corp.; Aero Co., Inc.; Macotech Corp.; Applied Technology Co., Ltd.; and Resources Conservation Co.

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Petitioner The Boeing Company ("Boeing") requests that this Court issue a writ of certiorari to review the decision of the United States Court of Claims entered in this case.

OPINIONS BELOW

The decision of the Court of Claims, which is reported at 680 F.2d 132 (Ct. Cl. 1982), is Appendix A to this petition. The decision of the Armed Services Board of Contract Appeals (ASBCA), which is reported at ASBCA No. 19224, 77-1 B.C.A. (CCH) ¶ 12,371, is Appendix B. The decision of the ASBCA on Reconsideration, which is reported at ASBCA No. 19224, 79-1 B.C.A. (CCH) ¶ 13,708, is Appendix C.

JURISDICTION

The decision of the Court of Claims was entered on June 2, 1982. A timely filed petition for rehearing en banc was denied on August 20, 1982 (Appendix D). Petitioner's application for an extension of time to file this petition on

or before December 18, 1982, was granted by an Order of the Chief Justice dated November 3, 1982 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article II, § 2, cl. 2 ("Appointments Clause") of the Constitution:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

50 U.S.C. app. § 2168:

> § 2168. Cost Accounting Standards Board—Formation; Comptroller General as chairman . . . .
>
> (a) There is established, as an agent of the Congress, a Cost-Accounting Standards Board which shall be independent of the executive departments and shall consist of the Comptroller General of the United States who shall serve as Chairman of the Board and four members to be appointed by the Comptroller General. . . .
>
> * * *
>
> Promulgation of cost accounting standards; use of standards by defense contractors and relevant Federal agencies . . . .
>
> (g) The Board shall from time to time promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts. Such promulgated standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing, administration and settlement of all

> negotiated prime contract and subcontract national defense procurements with the United States in excess of $100,000, [except as specified] . . . .
>
> * * *

Cost Accounting Standards ("CAS") 403 and 418, 4 C.F.R. §§ 403, 418 (1981), the Cost Accounting Standards Board's March 1973 Statement of Operating Policies, Procedures and Objectives, 38 Fed. Reg. 6122 (1973), and its May 1977 Restatement of Objectives, Policies and Concepts, 42 Fed. Reg. 25,752 (1977), Interpretation No. 1 to CAS 403, 45 Fed. Reg. 13,721 (1980), proposed CAS 403.50, 45 Fed. Reg. 49,573 (1980) (proposed July 25, 1980), and other pertinent statutory and regulatory provisions, appear in Appendix F.

STATEMENT OF THE CASE

This case raises a fundamental constitutional question: May a violation of the Appointments Clause be excused by an automatic invocation of the *de facto* officer doctrine to avoid addressing the unconstitutional appointment of the Cost Accounting Standards Board ("CASB") and its promulgation of Cost Accounting Standards, including CAS 403, at issue here? This case also raises fundamental questions about the Court of Claims' interpretation of CAS 403, which affects all persons involved in negotiated national defense contracts.

I.

The Cost Accounting Standards Board

The CASB was established by Section 719 of the Defense Production Act Amendments of 1970, Pub. L. No. 91-379, 50 U.S.C. app. § 2168, and was denominated an "agent of the Congress" designed to be "independent of the executive departments." The statute established a five-member Board. The Comptroller General of the United States, who serves at the will of Congress, was designated Chairman and was empowered to appoint the remaining members.

The CASB was commanded to "promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts." 50 U.S.C. app. § 2168(g). These "promulgated standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors in estimating, accumulating, and reporting costs" on negotiated national defense procurements, with exceptions not pertinent here. 50 U.S.C. app. § 2168(g). Subject to a two-House veto, the CASB's cost accounting standards have the "full force and effect of law." 50 U.S.C. app. § 2168(h)(3)-(i).

Under CASB regulations "any Federal agency making a national defense procurement," 4 C.F.R. § 331.20(a), must insert in all contracts a clause requiring the contractor to comply with all standards in existence on the date of the contract and all CASB standards to which the contractor might agree in any subsequent contract. In ten years the CASB promulgated nineteen cost accounting standards and several policy statements. Although the CASB ceased work in August 1980 when Congress denied it further appropriations, the promulgated standards remain effective and binding.[1]

II.

Background of the Case and Proceedings Below

Boeing manufactures aircraft, missiles and other products for government and commercial customers. In September 1972, it was awarded a research and development cost-plus-fixed fee contract by the Air Force which included the required "Cost Accounting Standards" clause. In December

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1. *See Senate Comm. on Banking, Housing, and Urban Affairs, Defense Production Act Extension of 1982*, S. Rep. No. 412, 97th Cong. 2d Sess. 2 (1982); *Transfer of Cost Accounting Standards Board: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 5 (1980) (statement of Elmer Staats, Comptroller General of the United States).

1972, the CASB promulgated CAS 403, 4 C.F.R. § 403 (1981). On January 1, 1974, CAS 403 was incorporated into the 1972 contract between the Air Force and Boeing, subject, however, to Boeing's explicit reservation of its right to challenge the validity of that standard.[2]

In 1974 and all subsequent years, Boeing conducted its business through a corporate headquarters in Seattle, Washington and several operating divisions. *Boeing Co.*, ASBCA No. 19224, App. B at 7, 77-1 B.C.A. (CCH) ¶ 12,371, at 59,871-72. Each of the plants that Boeing operates in the Seattle area is assigned to one division for administrative and maintenance purposes, normally the division that is the predominant user of the facility. App. B at 10, 77-1 B.C.A. (CCH) ¶ 12,371, at 59,873. However, the plants are also used by other divisions. Boeing's Seattle area plants, divisions and employees are part of a single, integrated organization. App. B at 11-12, 77-1 B.C.A. (CCH) ¶ 12,371, at 59,874.

Boeing pays state and local taxes in the State of Washington. The most significant are real and personal property taxes, sales and use taxes, and business and occupation (gross receipts) taxes. App. B at 4-6, 77-1 B.C.A. (CCH) ¶ 12,371, at 59,870-71. Accounting data used for calculating taxes are reported by the divisions to Boeing's headquarters, which prepares tax reports and pays taxes.

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2. In the 1972 contract at issue, Boeing agreed to "[c]omply with . . . any Cost Accounting Standard which hereafter becomes applicable to a contract or subcontract of the Contractor . . . ." *See* Defendant's Cross-Motion for Summary Judgment, Ex. 10. In every contract entered into since CAS 403 became purportedly applicable to Boeing, however, Boeing has disputed the applicability of CAS 403 to its contracts. *See* Affidavit of John O'Hara, attachment to Plaintiff's Reply Brief in Support of Motion for Summary Judgment. The reservation clause in these contracts binds Boeing and the Government to the outcome of this litigation. Boeing's complaint, which was pending when the reservation clause was adopted in 1974, challenged, *inter alia*, the validity of CAS 403. *See* Complaint, ASBCA No. 19224, ¶ 8. Accordingly, CAS 403 has never "become applicable to a contract or subcontract of" Boeing.

The court below overlooked this reservation of rights when it suggested that Boeing might not be able to "challenge contract provisions it has agreed to." App. A at 11, 680 F.2d at 138.

State and local tax expenses are allocated by Boeing to divisions, and then are reallocated by the divisions to benefiting final cost objectives—*i.e.*, individual contracts.

For many years Boeing has recognized in its accounting system that the police and fire protection, schools, streets, highways, social benefits and other local governmental services required by and benefiting Boeing products are the resources which it receives for the tax costs it incurs. Because these services benefit all of Boeing's business activity in the state, Boeing has allocated state and local tax costs to its divisions in accordance with each division's share of Boeing's business activity in the state. Boeing measures this share by the proportionate number of employees working in each division in the taxing jurisdiction.

In a labor-intensive company such as Boeing, the ratio of number of employees in each division is reasonably representative of its share of Boeing's total business activity. This method of allocating tax costs was previously approved by the ASBCA and the Court of Claims. *Boeing Co. v. United States*, 202 Ct. Cl. 315, 480 F.2d 854, 858 (1973) ("*Boeing I*"), *aff'g Boeing Co.*, ASBCA No. 11866, 69-2 B.C.A. (CCH) ¶ 7898. *See also Lockheed Aircraft Corp. v. United States*, 179 Ct. Cl. 545, 180 Ct. Cl. 1314, 375 F.2d 786 (1967) ("*Lockheed*").

The present dispute arose when, purporting to apply CAS 403, an Air Force contracting officer determined that Boeing's employee-base method for allocating its tax costs was not in compliance with that standard and mandated that each particular tax cost should be directly allocated to a division according to the location of the tax-assessment base. The contracting officer's decision was upheld by the ASBCA (App. B and C). That Board's decision was affirmed by the Court of Claims in the case now under review. *Boeing Co. v. United States*, 680 F.2d 132 (Ct. Cl. 1982) ("*Boeing II*") (App. A).

The Court of Claims concluded that CAS 403 provides that Boeing's taxes are home office expenses which must be allocated directly to divisions if they can be "identified

specifically" with individual divisions; that Boeing's tax costs can be so identified by the location of the tax-assessment base; and that such tax costs cannot be "identified specifically" with individual divisions by Boeing's employee-base method of proportionate allocation.

Although terming it "by no means insubstantial," the Court of Claims refused to rule upon Boeing's constitutional challenge to the CASB and CAS 403 under the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. It held that Boeing would not be entitled to relief because the CASB's members, even if unconstitutionally appointed, were "*de facto* officer[s]" whose acts were valid. It reasoned:

> "The number of contracts which would need to be altered, the amount of moneys involved, and the agreement by the contractors to the CAS 403 standards would justify nonretrospective application of any current ruling of unconstitutionality of the method of appointment of the CASB members."

App. A at 16-17, 680 F.2d at 141.

In so applying the *de facto* officer doctrine, the court did not discuss the terms of Boeing's contract, which included a clause that preserved Boeing's right to contest CAS 403, *see* note 2, *supra*, nor did it compare that contract to those of other companies to determine whether a ruling in Boeing's favor could apply to them. The court made no estimate of the monies that might be affected by its ruling, and did not discuss the nature or amount of litigation that might result from its ruling.

Alternatively, the Court of Claims held that

> "[T]he Department of Defense itself adopted CAS 403 and that Department had the independent authority to accept the standard on its own. . . . The Department was not deprived of its authority to adopt these standards because it may have assumed mistakenly . . . that the law compelled it to do so."

App. A at 16, 680 F.2d at 141.

REASONS FOR GRANTING THE WRIT

I.

The Court of Claims' Refusal To Rule That the CASB Was Appointed in Violation of the Appointments Clause Is in Conflict With Controlling Decisions of This Court.

The method chosen by Congress for appointment of the CASB violates the Appointments Clause, Art. II, § 2, cl. 2, of the Constitution. Without disputing Boeing's constitutional challenge, the Court of Claims refused to rule on the merits because of its improper application of the *de facto* officer doctrine and its plain error as to the effect of the Defense Department's republication of CAS 403. If the Court of Claims' decision is permitted to stand, the fundamental constitutional principle of separation of powers will be seriously weakened and an ongoing violation of that principle left uncorrected.

A. *The CASB's Appointment Was Unconstitutional and Its Promulgation of Binding Cost Accounting Standards Was Invalid.*

The members of the CASB were "Officers of the United States," who must be appointed in accordance with the Appointments Clause of the Constitution. Any violation of this clause "is a breach of the National fundamental law," *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928), which strikes "at the heart of our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976).

Congress' intention to place the CASB beyond the reach of the Executive Branch could not be more clear. *See* p. 3, *supra*. The functions of the CASB, however, were executive, not legislative,[3] and its members were "Officers of the United

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3. If Congress had succeeded—as it did not—in creating "an agent of the Congress" (50 U.S.C. app. § 2168(a)) that exercised wholly legislative powers, the CASB's standards would have violated the separation-of-powers principle in yet another way. To the extent the standards are binding upon the Executive Branch and the public, they have the effect of law. They would be, in substance, legislation enacted by Congress but without presentation to the President for his consent, as required by the Presentment Clause, U.S. Const. Art. I, § 7, cl. 2. Moreover, the standards

States." This Court in *Buckley v. Valeo, supra*, held that the Federal Election Commission's power to promulgate substantive rules for election of candidates for federal office was executive in nature, to be exercised only by "Officers of the United States" whose appointment satisfied the requirements of the Appointments Clause. That holding applies *a fortiori* to the CASB, which was to promulgate cost accounting standards binding upon "all relevant Federal agencies and . . . defense contractors and subcontractors. . . ." 50 U.S.C. app. § 2168(g) (1976).[4]

Congress "cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). The attempt by Congress to make the CASB an "agent of the Congress . . . independent of the executive departments," 50 U.S.C. app. § 2168(a), while

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Footnote 3 (con't)

themselves would effect a "legislative veto" of prior cost accounting regulations of the defense agencies. Such an attack on the principle of separation of powers has recently been held unconstitutional. *Chadha v. Immigration & Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), *cert. granted, juris. postponed*, 454 U.S. 812 (1981); *Consumers Union v. FTC*, 1982-83 Trade Cas. (CCH) ¶ 64,994 (D.C. Cir. Oct. 22, 1982) (*en banc*). *See Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3099 (U.S. Aug. 2, 1982) (No. 82-177).

4. This violation of the doctrine of separation of powers was discerned, even before this Court's decision in *Buckley*, by members of the Senate Banking and Currency Committee, which reported out the bill that created the CASB; by the Comptroller General; by various executive officers of the government, including the Secretary of Commerce; and by the American Institute of Certified Public Accountants. *See* S. Rep. No. 91-890, 91st Cong., 2d Sess. 15-16 (1970); *Hearings on S. 3302 Before the Subcomm. on Production and Stabilization of the Sen. Comm. on Banking and Currency*, 91st Cong., 2d Sess. 16, 22, 374-75 (1970). In addition, President Nixon, when signing the bill that created the CASB, requested amendment by Congress and stated his belief "that this provision [providing for the appointment of Board members by the Comptroller General] would unavoidably violate the fundamental principle of the separation of powers between the legislative and executive branches of the Government." 6 Weekly Comp. Pres. Doc. 1078, 1079 (1970).

giving the CASB executive duties and authority, violated the fundamental constitutional principle of separation of powers.

B. *The Court of Claims Improperly Allowed the Constitutional Error To Stand.*

1. *The de facto officer doctrine does not bar consideration of the merits of Boeing's constitutional challenge.*

As declared in *Buckley v. Valeo*: "This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." 424 U.S. at 123. Nonetheless, the Court of Claims refused even to consider Boeing's constitutional challenge, holding that the "principle of the *de facto* officer prevents in this case the past acts of the CASB from being held invalid." App. A at 16, 680 F.2d at 141. The court's virtually *per se* application of the *de facto* officer doctrine is inconsistent with this Court's prior decisions and, unless corrected, will result in the perpetuation of fundamental constitutional error.

The *de facto* officer doctrine is not a *per se* rule for the avoidance of constitutional challenges to the validity of official acts. Instead, the doctrine excuses certain defects in the composition or authority of public officials in a very narrow range of cases where strong considerations of equity or public policy support such a result. *See United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).[5]

Glidden Co. v. Zdanok, 370 U.S. 530 (1962), which, like this case, involved alleged violations of the constitutional principle of separation of powers, demonstrates the narrow confines of the doctrine and thereby illustrates the error in the Court of Claims' *per se* approach. While this Court in *Glidden* acknowledged the *de facto* officer doctrine, 370 U.S.

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5. It is a "doctrine of convenience, which can be disregarded when to do so will vindicate a strong policy regarding judicial administration or, a fortiori, when nonfrivolous constitutional grounds are advanced as the basis for the challenge to [an official's] authority." Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909 (1963).

at 535, it refused to bar the claims of the parties before it because their "challenge [was] based upon nonfrivolous constitutional grounds," 370 U.S. at 536—*i.e.*, the principle of separation of powers—and the countervailing interest—"the disruption to sound appellate process entailed by entertaining objections not raised below," *id.*,—was "plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.*[6]

The holding in *Glidden* should control this case. Both cases involve the constitutional principle of separation of powers, which the Government has characterized in the legislative-veto cases recently argued before this Court as "the most fundamental principle embodied in the Constitution." (Brief for Immigration and Naturalization Service, *INS v. Chadha*, Nos. 80-1852, *et al.*, at 45). In this case, however, there is no countervailing concern, as in *Glidden*, with the orderly administration of justice.

In addition, the Court of Claims' stated reason for refusing to decide the constitutional issue was insufficient:

> "Equity and practicality demand that result. The number of contracts which would need to be altered, the amount of moneys involved, and the agreement by the contractors to the CAS 403 standards would justify nonretrospective application of any current ruling of unconstitutionality of the method of appointment of the CASB members."

App. A at 16-17, 680 F.2d at 141. Nothing in *Glidden* sanctions reliance on such considerations to invoke the *de facto* officer doctrine to preclude a decision on the merits of a nonfrivolous separation-of-powers claim.

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6. *Glidden* involved challenges to two judicial decisions rendered by courts that included judges, sitting by designation, who allegedly were not Article III judges. The issue was "whether the judgment in either was vitiated by the respective participation of the judges named." 370 U.S. at 533.

Although Justice Harlan's plurality opinion in *Glidden* was the only opinion to discuss the *de facto* officer doctrine, all seven participating Justices (including the dissenters) reached the merits of the cases. Thus, a unanimous Court deemed the *de facto* officer doctrine not to be a bar to petitioners' constitutional challenge.

Moreover, the lower court's assumption that there are a "number of contracts" involving an unspecified "amount of moneys" which "would need to be altered" should Boeing prevail here is belied by one of the very factors singled out by the court as the reason for its refusal to rule for Boeing—"the agreement by the contractors to the CAS 403 standards." Contractors who have so agreed would be bound by the accounting standards, whatever their constitutional infirmities, under ordinary contractual principles. Of course, disputes concerning contracts already settled or litigated would be governed by the principle of *res judicata*.

Boeing did *not* agree to CAS 403. *See* p. 5, n.2, *supra*. It specifically reserved its right to challenge the validity of the standard. Thus, the court's justification for the *de facto* validity of CAS 403 is simply not applicable to Boeing.

Finally, the Court's assumption that many contracts involving vast sums of money would need to be "altered" was not based on any evidence in the record and amounted to pure speculation.

Buckley v. Valeo, upon which the Court of Claims relied in invoking the *de facto* officer doctrine, does not support the Court of Claims' decision. In *Buckley* this Court did decide the merits of the constitutional argument that was raised. The Court's reference in *Buckley* to the "*de facto* validity" to be accorded the past acts of the Federal Election Commission, 424 U.S. at 142, was thus descriptive of the Court's decision to give plaintiffs in that case the relief which they sought, but not to give its decision retroactive effect. The *Buckley* Court did not use the *de facto* officer doctrine either to avoid deciding the merits or to avoid granting plaintiffs the relief they sought.[7] This Court has recently cited *Buckley* in a manner that confirms this analysis. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S. Ct. 2858, 2880 n. 41 (1982).

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7. In *Buckley*, chaos would have resulted had the past acts and rules of the Federal Election Commission been invalidated. The nation would have been left, in January of a presidential-election year, with no rules or advisory opinions in effect to construe the governing statute and to

Because of its misapplication of the *de facto* officer doctrine, the Court of Claims incorrectly refused to decide the merits of Boeing's constitutional claim. Congress' constitutional error and the acts of the constitutionally flawed CASB are cast in stone as a result, unless this Court grants relief.

2. *Whether a decision on the constitutional issue is given retroactive or prospective-only effect, Boeing is entitled to the relief it seeks.*

The Court of Claims also attempted to justify its refusal to consider the merits of Boeing's constitutional challenge by concluding that "nonretrospective application of any current ruling of unconstitutionality of the method of appointment of the CASB members" made a decision on the merits academic and unnecessary. App. A at 16-17, 680 F.2d at 141. Decisions of this Court demonstrate that the Court of Claims erred in assuming that the prospective-only application of a ruling on the Appointments Clause issue here would bar Boeing's claim.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, *supra*, this Court held unconstitutional, on separation-of-powers grounds, certain aspects of Congress' grant of jurisdiction to Article I bankruptcy courts. The Court noted, *inter alia*, that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts," *id.* at 2880, and determined that its decision would apply only prospectively. Just as in *Buckley*, the Court not only made

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Footnote 7 (con't)

guide the conduct of candidates and political committees. Even payments of federal subsidies previously made to presidential candidates under rules prescribed by the Commission would have been invalidated and the funds paid out would presumably have had to be recaptured.

By contrast, invalidation of the CASB standards would not create a vacuum, but would merely render applicable, to the limited extent any retroactive effect might entail, the standards promulgated by the various departments before the CASB was created.

its decision prospective-only but also granted Congress time to correct its error. Even in these circumstances, the Court granted relief to the challenging party by applying the rule of decision to its claim even though no other litigating party could obtain similar relief. *Id.* This was in accordance with the Court's usual practice. *See Cipriano v. City of Houma*, 395 U.S. 701 (1969); *United States v. Johnson*, _____ U.S. _____, 102 S. Ct. 2579 (1982). *Compare Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) *with Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).[8]

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8. Criminal defendants who successfully challenge the constitutionality of their convictions gain the benefit of new constitutional rules, even where these rules are to be applied prospectively only. *See Miranda v. Arizona*, 384 U.S. 436 (1966). This is so because of "the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that [the Court] resolve issues solely in concrete cases or controversies, . . . militate against denying [challenging petitioners] the benefit of [decisions in their cases]." *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

A holding that the Cost Accounting Standards Act violates the Appointments Clause would not even represent a new constitutional rule within the meaning of *Miranda* and *Stovall*. The rule invoked by Boeing was announced at least as long ago as 1976, when *Buckley* was decided. Indeed, *Buckley* itself involved no departure from familiar constitutional principles.

United States v. Johnson, supra, referred to a narrow class of cases in which newly announced rules were given purely prospective effect and were not applied even to the litigants before the Court. 102 S. Ct. at 2584. The rationale of none of these decisions would justify a failure to grant Boeing relief here. In *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972), the prevailing parties were in fact granted relief. *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966), merely held that the *Miranda* rule would be given normal prospective-only application. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964), a newly announced (non-constitutional) rule was not applied to the disadvantage of plaintiffs who had reasonably relied on a prior rule and who would have been severely injured had the new rule been applied to them. In *James v. United States*, 366 U.S. 213, 221-22 (1961), the Court reversed a tax-evasion conviction on the ground that the defendant had not "willfully" violated the law, since his acts were consistent with a prior Supreme Court decision in effect at the time the defendant acted but which the Court overruled in *James*. Moreover, as noted above, a decision in Boeing's favor would not involve the announcement of a new rule at all.

Such a prospective-only invalidation of CAS 403 here, with relief only to Boeing by the application of the cost allocation standards existing before CAS 403, would require a judgment in Boeing's favor. For the Court of Claims condemned Boeing's allocation of state and local taxes, which that court had previously approved in *Boeing I*, solely on the basis of allegedly new requirements of CAS 403.[9]

The importance of this case is not diminished by the fact that the CASB is no longer in existence. To the contrary, the Board's standards remain effective, binding departments and contractors, even though no agency is empowered to reconsider, to amend, to supplement or to repeal them.[10] Their invalidation, even if prospective only, would return rule-making power for such standards to the various departments of the Executive Branch or would lead Congress to establish some new agency, constitutionally appointed, to prescribe uniform standards.

3. *The Court erred in concluding that the Defense Department's republication of CAS 403 precluded Boeing's constitutional challenge.*

As an alternative ground for refusing to consider Boeing's claim under the Appointments Clause, the Court of Claims held "that the Department of Defense itself adopted CAS 403 and that Department had the independent authority to accept the standard on its own." App. A at 16, 680 F.2d at 141. On this basis, the Court of Claims held that even if the Department "assumed mistakenly . . . that the law compelled it to" adopt CAS 403, Boeing would be bound by that standard. The Court of Claims erred both in holding that the Department had "independent authority" to promulgate standards and in holding that its republication of CAS 403 would bind Boeing even if made for a "mistaken" reason.

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9. Although Boeing is entitled to relief even if the CASB promulgation of CAS 403 is held unconstitutional only prospectively, the court also erred in assessing the purported inequities and practicalities that might result from the retroactive application of a judgment in Boeing's favor. *See* p. 11, *supra*.

10. *See* n.1, *supra*.

Under the Cost Accounting Standards Act, the CASB's standards "*shall* be used by all relevant Federal agencies and by defense contractors and subcontractors." 50 U.S.C. app. § 2168(g) (1976) (emphasis added). Congress did not grant the Defense Department an option to adopt or to reject the CASB's cost-accounting standards. The Defense Department did not purport to exercise such an option; it republished CAS 403 solely because it correctly believed that it was obliged by statute to adhere to that standard.[11]

The Defense Department's republication of CAS 403 cannot be applied against Boeing, as the lower court believed, on the theory that "whatever the departmental motivation, that agency permissibly established the standard and intended to do so." App. A at 16, 680 F.2d at 141. When an agency acts ministerially pursuant to a statutory command, its action cannot be upheld on the ground that it might have reached the same result had it been exercising discretion.[12]

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11. The Department acknowledged that it was bound by the CASB's cost accounting standards when it incorporated such standards into its procurement regulations in *Defense Procurement Circular* No. 99, Item I at 2 (1972) (App. F at 68):

> "Public Law 91-369, 50 U.S.C. app. 2168, as implemented by the Cost Accounting Standards Board (4 C.F.R. § 331 *et seq.*), *requires* the development [by the CASB] of Cost Accounting Standards to be used in connection with negotiated national defense contracts. . . .
>
> The purpose of this item is to establish initial Department of Defense policies and procedures *for compliance with this law and the regulations issued thereunder.*"

(Emphasis added.)

12. There is no basis in the record for believing the Department would have adopted CAS 403 if it had not been motivated by its view that it was required to do so. Indeed, the record is squarely to the contrary. The Department, which had promulgated its own cost principles for national-defense contracts, objected to CAS 403. *See* Defense Contract Audit Agency, Comments re Allocation of Home Office Expenses to Segments (7/31/72), Exh. C.50 to Affidavit of Harold F. Olsen in Support of Plaintiff's Motion for Summary Judgment in Court of Claims ("Olsen Aff."); Office of Assistant Secretary of Defense, Comment re Proposed Cost Accounting Standard (9/12/72), and Memorandum to Assistant Secretary of Defense from Deputy Assistant Secretary of Defense (Procurement) (11/3/72), Exh. C.154 to Olsen Aff.

An agency's "action must be measured by what [it] did, not by what it might have done." *SEC v. Chenery*, 318 U.S. 80, 93-94 (1943). "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Id.* at 95. *See also FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

* * * *

The Court of Claims has excused a violation of the Constitution's Appointments Clause on demonstrably erroneous grounds. This Court should grant certiorari to repair this "breach of the National fundamental law," this error which goes to the "heart of our Constitution." *See* p. 8, *supra*.

II.

The Court of Claims' Construction of CAS 403 Violated Established Principles of Construing Administrative Rules in That It Ignored and Is Inconsistent with the CASB's Intent and Interpretation of That Standard.

Boeing contends that CAS 403 did not condemn the company's long-established practice, previously approved by the Court of Claims in *Boeing I*, of allocating state and local taxes to its divisions based on proportionate shares of business activity. Boeing's interpretation of CAS 403 was confirmed by the CASB's May 1977 Restatement, by its March 1980 Interpretation No. 1 to CAS 403, and by its May 1980 Proposed Amendment to CAS 403. The Court of Claims failed to abide by or even to acknowledge these indications of the CASB's interpretations and intent with respect to CAS 403.

Had the Court of Claims upheld Boeing's constitutional challenge to the CASB, it would properly have ignored the CASB's original promulgation and subsequent interpretation of CAS 403. However, by giving *de facto* sanction to the CASB's action but then ignoring expressions of the CASB relating to interpretation of CAS 403 subsequent to its original promulgation, the Court of Claims violated the familiar rule that "a court must necessarily look to the administrative

construction of the regulation"[13] and the related principle that statutes and regulations must be construed to effectuate the promulgating body's intent.[14]

The question presented here is whether CAS 403 precludes Boeing from continuing to allocate state and local taxes to its divisions on a base reasonably representative of each division's proportionate share of Boeing's business activity within the taxing jurisdiction.[15] The Court of Claims held that it does because the court concluded that under CAS 403.40(b)(4) the costs of Boeing's state and local tax expenses can be "identified specifically" with and therefore must be allocated directly, not proportionately, to individual divisions. This ruling was contrary to the sound cost accounting that was initially intended by the CASB and was expressly endorsed by it in later promulgations.[16]

The CASB provided guidance on the proper application of the term "identified specifically" in its May 1977 Restatement. There, the CASB stated that direct identification of costs to final cost objectives, analogous to the question of direct identification under CAS 403, is appropriate only when

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13. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also United States v. Larionoff*, 431 U.S. 864, 872-73 (1977); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Thorpe v. Housing Authority*, 393 U.S. 268, 276 (1969).

14. *See, e.g., Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962); *Honeywell, Inc. v. United States*, 661 F.2d 182 (Ct. Cl. 1981).

15. The relevant sections of CAS 403, 403.40(a)(1) and (b)(4) are set forth in App. F at 12 and 13-14, respectively.

16. Although a total system of CAS was envisioned by Congress and by the CASB, the CAS and pertinent policy statements were promulgated one at a time over many years. *See* 4 C.F.R. 400 *et seq.* The policy statements promulgated by the CASB include its March 1973 Statement of Operating Policies, Procedures and Objectives, 38 Fed. Reg. 6122 (1973), and its May 1977 Restatement of Objectives, Policies and Concepts, 42 Fed. Reg. 25,752 (1977).

The CASB's March 1973 Statement and its May 1977 Restatement, which state certain cost accounting concepts pertinent to this case, are in App. F at 21 and 26, respectively.

(1) the "beneficial or causal relationship" between the incurrence of the cost and the cost objective is "clear and exclusive," and when (2) the amount of resources used is "readily and economically measurable." State and local taxes cannot be "identified specifically" with Boeing's divisions under either of these criteria.

The beneficial or causal relationship between the costs and the cost objectives depends on the relationship between the resources represented by the tax costs and the divisions which benefit from these resources.[17] The resources for which Boeing pays state and local taxes are police and fire protection, schools, streets, highways and other governmental services. *See Washington Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 760 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964). *See also Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (property taxes are taxes by which the state apportions the cost of such services as police and fire protection among the beneficiaries of such services).[18]

Boeing argued below that the relationship between these resources and any individual Boeing division is not "clear and exclusive," as required by the Restatement for direct allocation to be appropriate, because Boeing has more than one division operating in each taxing jurisdiction and each benefits from these resources. Similarly, all the divisions operating in a taxing jurisdiction proportionately cause the need for such governmental services.

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17. The CASB Restatement notes that "[s]tandards on cost allocation treat with the accounting for the flow of incurred costs as resources are used." App. F at 32. Costs have accounting meaning only in terms of resources consumed. *See* Michael S. Katz, "An Analysis of Accounting Issues Involved in the Decision of the ASBCA in *The Boeing Company*, ASBCA No. 19224, 77-1 BCA § 12371," Vol. II, No. 2, Nat'l Cont. Mgmt. J. at 28-29 (1977-78).

18. The Supreme Court of Washington held in *Harbor Air Service, Inc. v. State, Department of Revenue*, 88 Wn.2d 359, 364, 560 P.2d 1145, 1148 (1977): "The State provides governmental services to a business as a citizen of the State, and the business pays for the services in its capacity as a taxpayer."

For the same reason, Boeing argued that the amount of resources, *i.e.*, the governmental services related to each tax and used by each Boeing division, is not "readily and economically measurable."

Refusing even to acknowledge the CASB's interpretation of "direct identification" in the Restatement, the Court of Claims did not decide that either the "clear and exclusive" or the "readily and economically measurable" test was met here.[19]

The Court of Claims' holding, moreover, is contradicted by the CASB's intent expressed in its Interpretation No. 1 to CAS 403, promulgated March 3, 1980, 45 Fed. Reg. 13,721 (App. F at 35). That interpretation expressly rejected the assessment base approach to allocate state and local income taxes to divisions where more than one division operates in a taxing jurisdiction. The CASB stated:

> "[W]here there is more than one segment [division] in a taxing jurisdiction, the taxes are to be allocated among those segments on the basis of 'the same factors used to determine the taxable income for that jurisdiction.' "

Those factors typically measure the proportionate share of business activity in the state, based on payroll, property, and sales, not the assessment base of the tax, *i.e.*, income.

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19. The Court of Claims' failure to apply the May 1977 Restatement is contrary to CAS 418, on "Allocation of Direct and Indirect Costs," (App. F at 45), promulgated in 1980, which applied the Restatement's principles in establishing criteria for direct identification of indirect costs to intermediate cost objectives, such as divisions which are at issue here. *See* CAS 418, "Allocation of Direct and Indirect Costs," and Preamble A, 4 C.F.R. § 418 at 472 (1982) ("the Board is providing [in CAS 418] a more general Standard incorporating the basic concepts of cost allocation previously established in the Board's *Restatement of Objectives, Policies and Concepts*"); CAS 418.50(a)(3) and 418.50 (d)(3), 4 C.F.R. 418.50(a)(3) and 418.50(d)(3). CAS 418.50(a)(3) provides: "costs identified specifically with one of the particular cost objectives listed in paragraph (d)(3) [these include intermediate and final cost objectives] of this section shall be accounted for as direct . . . costs." CAS 418.30(a)(2) defines a direct cost as: "Any cost which is identified specifically with a particular final cost objective." Thus CAS 418 indicates that for a cost to be identified specifically with an intermediate cost objective, the same test must be met as for a direct cost to be identified specifically with a final cost objective.

See Mobil Oil Corp. v. Commissioner, 445 U.S. 425 (1980); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

Finally, the CASB's Proposed Amendment to CAS 403, 45 Fed. Reg. 49,573 (July 25, 1980), (App. F at 38), states at 403.50(c)(4): "Where [an income] tax return for a taxing jurisdiction covers more than one segment [division] that does business in that jurisdiction, the tax cost shall be allocated among these segments in accordance with the *last* sentence of § 403.40(b)(4)." (Emphasis added.) Because the last sentence of that section refers to payments which "cannot be identified specifically" and requires their "allocation [by use of a] base representative of the factors on which the total payment is based," this proposed amendment demonstrates the CASB's intention not to allocate state taxes directly by the "identified specifically" test when, as in Boeing's case, more than one division of a company does business within a jurisdiction.[20]

The Court of Claims did not address the significance of the CASB's 1980 action. As with the test for "direct identification" in the May 1977 Restatement, the court ignored the CASB's interpretations and expressed intentions.

The Court of Claims thereby embraced a construction of CAS 403 that is at odds with clear expressions of the CASB's intent on allocation of tax costs. Because of the Court of Claims' violation of established principles of construing administrative rules and this case's importance to national

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20. Although the proposed amendment was not adopted because of expiration of the CASB's tenure, it unmistakably indicates the Board's original intent. The CASB stated that the method contained in the amendment "is the same as that which the CASB had intended to require under CAS 403 originally. However, the language has been revised to clarify the original intent." 45 Fed. Reg. 49,573 (July 25, 1980). App. F at 39.

Where an unclear regulation is supplemented by an amendment that clearly states the promulgating agency's intent, the amendment is entitled to great weight in determining the intent behind the prior regulation. *Betesh v. United States*, 400 F. Supp. 238 (D.D.C. 1974); *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

defense procurements,[21] the Court should review the Court of Claims' interpretation of CAS 403.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the decision of the Court of Claims should be granted.

Respectfully submitted,

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21. *See Commissioner v. Lincoln Savings & Loan Association*, 403 U.S. 345, 346-47 (1971) (petition granted "[b]ecause of the importance of the issue for the savings and loan industry and for the Government").